Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO T-01-105 OF 1997

GOPAL SRI RAM, DENIS ONG AND HAIDAR JJCA

16 JUNE 2000

Civil Procedure *— Parties — Test to determine if party is properly impleaded — State Director cited as defendant — Whether as a result state executive council impleaded as party — National Land Code 1965 s 16(2)*

Contract *— Frustration — Alienation of land — Failure to alienate land in accordance with consent judgment entered into by state government — Power to alienate land at sole discretion of state executive council — Whether state executive council was party to action — Whether decision of state executive council not to alienate land was a supervening event which frustrates consent order*

The appellant was the sub-lessee of certain lands in Kerteh Terengganu ('the land'). In the years 1984 and 1986, the government of the state of Terengganu acquired some of the land. The appellant took out an originating summons ('the first action') challenging the acquisition. The second, third and fourth respondents were cited as defendants in the first action. The State Legal Adviser represented them. Following negotiations between the appellant's solicitors and the State Legal Adviser, the first action was compromised and the agreement was recorded in the form of a consent order. However, difficulty arose when the state authority, ie the State Executive Council ('the Exco') of the first respondent decided to reject the appellant's application for the alienation of the land referred to in the consent order. The respondents commenced an action ('the second action') seeking for a declaration that they were not bound by the terms of the consent order. It was submitted that the obligation to secure the alienation of the land was not something over which they had any control because the provisions of the National Land Code 1965 ('the Code') vest the power to alienate land in the sole discretion of the Exco. The decision of the Exco was a supervening event over which the respondents had no control. As such the consent order was frustrated. The High Court agreed with the respondents' argument and granted the relief sought by them. The appellant appealed. The issues before the court were: (i) whether the first respondent had been impleaded as a party to the first action and was therefore bound by its terms; (ii) whether the consent order had become frustrated; and (iii) whether the respondents adopted the correct procedure.

Held, allowing the appeal:

(1) By virtue of s 16(2) of the Code, the State Authority is to be impleaded in a suit or other proceeding by citing the State Director as a party. It was not in dispute that the second

respondent, the State Director, was a defendant in the first action. He was the first defendant. The state authority was therefore a party to the first action by virtue of s 16(2) of the Code (see p 708H–I). A

(2) It is well settled that the doctrine of frustration has no room where there is fault on the part of the party pleading it. In the present case, the refusal of the Exco to alienate the land in question was a deliberate act of non-compliance of the consent order by a party to the first action. It was not a supervening event at all. In these circumstances, it was not open to the respondents to rely on the doctrine (see pp 710F, I–711A). B

(3) Section 29(1)(b) of the Government Proceedings Act 1956 has nothing whatsoever to do with the facts of this case. There was no bar to the Exco binding itself to alienate land to any person. Once the agreement was entered into and formalised as a rule of court, it vested in the appellant a legitimate expectation that the promise made to it will be carried out (see p 711F). C D

(4) Section 42 of the Code vests the power in the Exco to alienate land. That was precisely what the Exco agreed to do in the first action. The Exco's later change of heart was not a supervening event that frustrated the consent order. It was a breach of an obligation voluntarily undertaken and given effect to in the form of an order of the court (see p 712B–C). E

(5) The declaration in the terms sought by the respondents would not result in there being two inconsistent decisions in the same matter. Further a consent order may be set aside in a fresh action on the same grounds on which an agreement may be set aside. The respondents in the present case had not made out a case to impeach the judgment in the first action (see p 713C–D). F

[Bahasa Malaysia summary

Perayu adalah penerima pajak tanah-tanah tertentu di Kerteh Terengganu ('tanah tersebut'). Pada tahun-tahun 1984 dan 1986 kerajaan negeri Terengganu telah mengambil sebahagian daripada tanah tersebut. Perayu telah mengambil saman pemula ('tindakan pertama tersebut') untuk mencabar pengambilan tanah tersebut. Responden kedua, ketiga dan keempat telah dinamakan sebagai defendan-defendan di dalam tindakan pertama tersebut. Penasihat Undang-undang Negeri mewakili mereka. Berikutan rundingan antara peguam perayu-perayu dan Penasihat Undang-undang Negeri, tindakan pertama tersebut telah dikompromi dan perjanjian telah dicatatkan di dalam bentuk persetujuan perintah. Namun, kesulitan berbangkit apabila pihak berkuasa negeri, iaitu Majlis Berkuasa Negeri ('Exco') responden pertama berkeputusan untuk menolak permohonan perayu untuk pemberimilikan tanah yang dirujuk di dalam perintah persetujuan. Responden telah memulakan suatu G H I

tindakan ('tindakan kedua tersebut') dan memohon suatu deklarasi bahawa mereka tidak diikat oleh terma-terma perintah persetujuan tersebut. Adalah dihujahkan bahawa kewajipan untuk mendapatkan pemberimilikan tanah tersebut bukanlah sesuatu yang mereka mempunyai sebarang kawalan kerana peruntukan-peruntukan Kanun Tanah Negara 1965 ('Kanun tersebut') meletakhak kuasa untuk pemberimilikan tanah di atas budi bicara tunggal Exco. Keputusan Exco adalah kejadian yang tidak dijangka di mana responden-responden tiada kawalan. Oleh yang demikian, perintah persetujuan tidak boleh dilaksanakan. Mahkamah Tinggi bersetuju dengan hujahan responden-responden dan memberikan relif yang dipohon oleh mereka. Perayu telah merayu. Isu-isu di hadapan mahkamah adalah: (i) sama ada responden pertama telah dimasukkan sebagai suatu pihak kepada tindakan pertama dan dengan itu tertakluk kepada terma-termanya; (ii) sama ada perintah persetujuan telah dikecewakan; dan (iii) sama ada responden-responden telah memakai prosedur yang betul.

Diputuskan, membenarkan rayuan tersebut:

(1) Menurut s 16(2) Kanun tersebut, Pihak Berkuasa Negeri mestilah dimasukkan di dalam guaman atau prosiding lain dengan menamakan Pengarah Negeri sebagai suatu pihak. Adalah tidak dipertikaikan bahawa responden kedua, Pengarah Negeri, adalah defendan di dalam tindakan pertama tersebut. Beliau adalah defendan pertama. Dengan itu pihak berkuasa negeri adalah suatu pihak kepada tindakan pertama menurut s 16(2) Kanun tersebut (lihat ms 708H–I).

(2) Ia adalah sesuatu yang tidak dipertikaikan bahawa doktrin kekecewaan tidak terbuka apabila terdapat kesalahan di pihak yang memplidkannya. Di dalam kes ini, keengganan Exco untuk memberimilik tanah yang dipersoalkan adalah suatu tindakan yang sengaja tidak mematuhi perintah persetujuan oleh suatu pihak kepada tindakan pertama. Ia bukanlah kejadian yang tidak dijangka langsung. Di dalam keadaan-keadaan berikut, adalah tidak terbuka kepada responden-responden untuk bergantung kepada doktrin tersebut (lihat ms 710F, I–711A).

(3) Seksyen 29(1)(b) Akta Prosiding Kerajaan 1956 tiada kaitan langsung kepada fakta-fakta kes ini. Tiada halangan kepada Exco mengikat dirinya untuk memberimilik tanah kepada sesiapa. Selepas perjanjian dimasuki dan dirasmikan sebagai suatu kaedah mahkamah, ia meletakkan hak ke atas perayu suatu harapan sah bahawa janji tersebut yang dibuat olehnya akan dilaksanakan (lihat ms 711F).

(4) Seksyen 42 Kanun tersebut meletakhak kuasa di dalam Exco untuk memberimilik tanah. Itulah yang secara jelas dipersetujui dibuat oleh Exco di dalam tindakan pertama tersebut. Perubahan keputusan Exco bukanlah kejadian yang tidak dijangkakan yang

mengecewakan perintah persetujuan tersebut. Ia adalah pelanggaran suatu kewajipan yang diterima dengan sukarela dan diberikan kesan di dalam bentuk perintah mahkamah (lihat ms 712B–C). A

(5) Deklarasi di dalam terma-terma yang dipohon oleh responden-responden tidak akan mengakibatkan berlakunya dua keputusan yang tidak konsisten di dalam perkara yang sama. Selanjutnya, suatu perintah persetujuan boleh diketepikan di dalam tindakan yang baru di atas alasan-alasan yang sama di mana suatu perjanjian boleh diketepikan. Responden-responden di dalam kes ini belum membuktikan suatu kes untuk mencabar penghakiman di dalam tindakan pertama tersebut (lihat ms 713C–D).] B C

Notes

For a case on test to determine if party is properly impleaded, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 3403.

For cases on frustration generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2216–2239. D

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393 (refd) E

Brydges v Brydges & Wood [1909] P 187 (refd)

Dato Yap Peng & Ors v Public Bank Bhd & Ors [1997] 3 MLJ 484 (refd)

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697 (refd) F

Ibeneweka v Egbuna [1964] 1 WLR 219 (refd)

Khaw Poh Chhuan v Ng Gaik Peng [1996] 1 MLJ 761 (refd)

Kheng Chwee Lian v Wong Tak Thong [1983] 2 MLJ 320 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1 (refd) G

Ocean Tramp Tankers Corp v V/O Sovfracht [1964] 1 All ER 161 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317 (refd)

Sungai Wangi Estate v Uni [1975] 1 MLJ 136 (refd)

Tong Lee Hwa & Anor v Chin Ah Kwi and Tong Chong Fah v Chin Ah Kwi [1971] 2 MLJ 75 (refd) H

Legislation referred to

Contracts Act 1950 s 57(2)

Government Proceedings Act 1956 s 29(b) I

Land Acquisition Act 1960

National Land Code 1965 ss 5, 12, 16(2), 16(3), 42

Appeal from: Originating Summons No 24(21)–66 of 1997 (High Court, Kuala Terengganu)

RR Sethu (*S Kanawangi* and *Mokhtar Ngah* with him) (*Mokhtar Ngah & Co*) for the appellant.

Abdul Karim bin Abdul Rahman (*Wan Farid bin Wan Salleh* with him) (Terengganu State Legal Adviser) for the respondents.

Gopal Sri Ram JCA (delivering judgment of the court):

The background

This appeal has been brought against the order of the High Court at Kuala Terengganu granting a declaration that certain paragraphs of a consent order made in earlier proceedings between the appellant and the second, third and fourth respondents are no longer binding on the respondents. To appreciate the issues raised in this appeal, it is necessary to recite the factual background against which this appeal rests.

The appellant was at all material times the sub-lessee of certain lands ('the said land') in Kerteh, in the State of Terengganu. The exact area of the said land is uncertain, as it has not been surveyed. But it is not in dispute that it is between 15,000 and 20,000 acres. In the years 1984 and 1986, the Government of the State of Terengganu acquired some 3,132 acres of the said land under eight notifications published in the Gazette. We will, for convenience refer to these 3,132 acres as 'the acquired lands'. The appellant objected to this acquisition and its objection was, in the usual way, referred to the High Court under the provisions of the Land Acquisition Act 1960. In the meantime the appellant took out an Originating Summons No 21(24)–87–94 ('the first action') challenging the acquisition of the acquired lands. The second, third and fourth respondents were cited as defendants in the first action. The state legal adviser represented them.

Following negotiations between the appellant's solicitors and the state legal adviser, the first action was compromised. On 17 November 1991, counsel for the disputants appeared before the judge at the High Court at Kuala Terengganu and recorded the agreement between them in the form of a consent order ('the said consent order'). It contains 14 paragraphs. They read as follows:

> (1) The Menteri Besar, Terengganu, within the meaning of the Menteri Besar (Incorporation) Enactment 1951 (hereinafter called the said Menteri Besar) shall surrender or cause to be surrendered all the concession land known as the Kerteh Concession, in the District of Kemaman, in the State of Terengganu (hereinafter referred to as the said Kerteh Concession) to the state authority of Terengganu (hereinafter called the said state authority), through the Pengarah Tanah dan Galian, Terengganu (hereinafter called the said Pengarah Tanah dan Galian); the said Kerteh Concession comprising of:
>
> (a) all that Concession known as the Kerteh Concession in the Mukim of Kerteh in the District of Kerteh, Terengganu granted by His Royal Highness, the Sultan of Terengganu to the late Tungku Musa bin Tungku Sulaiman.

(b) All that the three (3) Leases dated 16th day of Rabial Akhir 1326 (corresponding to 27 April 1909) of 3,500 acres for 99 years; 8th day of Sha'aban 1328 (corresponding to 14th day of August 1910) of an additional area of 3,500 acres for 99 years; and 8th day of Zulakaedah 1329 (corresponding to 30 August 1911) of approximately 180 acres for, 99 years of Portions of the said Kerteh Concession from the late Tungku Musa bin Tungku Sulaiman to the East Asiatic Company Limited and the vesting of all the rights interest, title thereof by the said East Asiatic Co Ltd to the East Asiatic Industry and Plantation Co Ltd by an Agreement made in 1919 and the transfer and/or assignments of the residue then unexpired thereof to the plaintiff, then known as Yee Seng Plantations Limited and now known as Yee Seng Plantations Sdn Bhd by an Indenture dated 16 June 1966.

(c) Two (2) Leases dated 8th day of Sha'aban 1328 (corresponding to the 14th day of August 1910) of 3,500 acres for 99 years and 15th day of Jamudilakhir 1335 (corresponding to 7 April 1917) of an additional 5,000 for 99 years of Portions of the said Kerteh Concessions by Tungku Musa bin Tungku Sulaiman to the East Asiatic Company Limited and the transferring thereof by the East Asiatic Company to the East Asiatic Rubber Estates Limited by a Transfer dated 20 June 1923 and the transfer/assignments of the residue then unexpired thereof by the said East Asiatic Rubber Estates Limited to the plaintiff, then known as Yee Seng Plantations Limited and now known as Yee Seng Plantations Sdn Berhad by an Indenture dated 16 June 1966.

(2) The said Pengarah Tanah dan Galian; the Collector of Land Revenue, Kemaman, Terengganu (hereinafter called 'the said Collector of Land Revenue') and the said Menteri Besar will assist the said Kerteh Concession land to be surveyed at the plaintiff's own costs.

(3) After the said survey of the said Kerteh Concession, the said Pengarah Tanah dan Galian; the said collector of Land Revenue and the said Menteri Besar shall then cause the said state authority to alienate or realienate an area of not less than five thousand (5,000) acres of the land forming part of the said Kerteh Concession as delineated and coloured green on the plan annexed hereto to the plaintiff abovenamed Yee Seng Plantations Sdn Berhad (hereinafter called the plaintiff) by a Qualified title which shall be for the period of ninety nine (99) years at the premium not exceeding the sum of ringgit four hundred ($400) per acre and the said Qualified title to be replaced by a final title;

(4) As the said Pengarah Tanah dan Galian; the said Collector of Land Revenue and the said Menteri Besar are unable to alienate further acreage to the plaintiff in the Kerteh Concession due to the same being: encumbered with the issuance of Temporary Occupation Licences, the said Pengarah Tanah dan Galian; the said Collector of Land Revenue and the said Menteri Besar shall (subject to payment of dislocation costs to the plaintiff as, hereinafter set out) cause the said state authority to alienate, by a Qualified Title to be replaced by a Final Title, an area of a further Five Thousand (5,000) acres of the land at Ketengah as delineated and coloured blue on the plan annexed hereto after survey, to the plaintiff for the period of sixty (60) years at the premium. not exceeding the sum of ringgit Three Hundred ($300) per acre.

(5) The title or titles to the said lands to be alienated or realienated to the plaintiff as set out in paras (3) and (4) hereof shall be free of all encumbrances and restrictions of whatsoever nature except that, the same shall not be transferred or charged without the consent of the said Pengarah Tanah dan Galian and that the said lands can be used for such agricultural purposes as the plaintiff abovenamed deems fit and all the lands alienated or to be realienated to the plaintiff as aforesaid shall be absolutely vacant;

(6) On the alienation or realienation of said lands to the plaintiff as aforesaid and on the issuance of the documents of title in respect thereof to the plaintiff as aforesaid, the plaintiff shall surrender the Kerteh Concession to the state authority within 30 days from the delivery of the issued documents of titles as aforesaid to the plaintiff;

(7) For the acquisition of the Kerteh Concession land pursuant to the aforesaid Land Acquisition References and other proceedings, after taking into consideration the alienation or realienation of the land at Kerteh as aforesaid, the alienation of the land at Ketengah as aforesaid and the dislocation costs as hereinafter set out, the said Pengarah Tanah dan Galian, the said Collector of Land Revenue and the said Menteri Besar shall pay to the plaintiff, the additional agreed sum of Ringgit Twelve million and five hundred thousand ($12,500,000). The Pengarah Tanah dan Galian, Terengganu, the Collector of Land Revenue, Kemaman, Terengganu and the Menteri Besar, Terengganu shall pay or cause to be paid to the plaintiff the said additional sum of $12,500,000 in the manner following, viz:

(a) The sum of Ringgit Five million ($5,000,000) within one (1) month from the date of this order;

(b) The balance of Ringgit Seven million and five hundred thousand ($7,500,000) less all the premium due, to be paid by April 1992 but not later than 30 June 1992;

(8) The said Pengarah Tanah dan Galian, the said Collector of Land Revenue and the said Menteri Besar shall cause the deposits lodged plaintiff in the Acquisition References to be refunded to the plaintiff by the said collector of Land Revenue or such other appropriate authority or authorities;

(9) As the said Pengarah Tanah dan Galian, the said Collector of Land Revenue and the said Menteri Besar are unable to alienate or realienate a further five thousand (5,000) acres of land in Kerteh to the plaintiff, due to unavoidable circumstances understood by both parties, the said Pengarah Tanah dan Galian; the said Collector of Land Revenue and the said Menteri Besar shall cause five thousand (5,000) acres of land in Ketengah to be alienated to the plaintiff in lieu thereof as aforesaid, and the said Pengarah Tanah dan Galian; the said Collector of Land Revenue and the said Menteri Besar shall further pay or cause to be paid to the plaintiff, the further agreed sum of Ringgit three million ($3,000,000) as Dislocation Costs which said sum the said Pengarah Tanah dan Galian, the said Collector of Land Revenue and the said Menteri Besar shall pay or cause to be paid to the plaintiff as soon as practicable after the payment stipulated in clause (7)(b) above but not later than 31 March 1993;

(10) The plaintiff shall be at liberty to appeal to the said Pengarah Tanah dan Galian, the said Collector of Land Revenue and the said Menteri Besar

or to the appropriate authority for a reduction in the premiums and the same shall be considered favourably by the appropriate authority or authorities; A

(11) All the lands to be realienated and alienated to the plaintiff, as aforesaid, shall be subject to survey and shall be absolutely vacant;

(12) In the event, the documents of title to the lands to be realienated and alienated to the plaintiff are issued before the last payment of the monies is due for payment to the plaintiff pursuant to para 7(b) hereof, then the premiums payable shall be deducted from this payment. In the event the documents of title to the land to be realienated and alienated to the plaintiff are issued after the last payment of the monies is due for payment to the plaintiff pursuant to para 7(b) hereof, then the premiums payable shall be paid by the plaintiff on the issuance and delivery of the said documents of title to the plaintiff, in which event the monies payable to the plaintiff pursuant to para 7(b) hereof shall be paid or caused to be paid by said Pengarah Tanah dan Galian, the said Collector of Land Revenue and the said Menteri Besar on the date due for payment as therein ordered; B C

(13) The plaintiff shall not be at liberty to contend that the said Consent Order dated the 29 October 1982 made in Kuala Terengganu High Court Land Reference No 1 of 1979 is irregular or bad in law and shall not be at liberty to take any steps or any proceedings questioning the validity of the said Consent Order. D

(14) The plaintiff shall not proceed further with the aforesaid Land References and shall withdraw or discontinue the same upon the finalisation of all the matters herein. E

It is common ground (and the learned judge accepted this) that following the entry of this consent order steps were taken by the parties to the first action to implement its terms. However, difficulties arose when the state authority, namely, the State Executive Council ('the Exco') of the first respondent decided to reject the appellant's application for the alienation of the Kerteh land referred to in the consent order. This happened on 23 July 1996. The decision of the Exco was communicated to the respondent by the Land Administrator in his letter dated 3 February 1997. F

On 29 May 1997, the instant respondents commenced an action by an originating summons ('the second action'). In it they sought a declaration that they were not bound by the terms of the said consent order, in particular, but not limited to, paras 3 to 14 thereof. It was the respondents' case in support of its summons that the second, third and fourth respondents had fulfilled such of the terms of the said consent order as lay within their power to do. In respect of the obligation to secure the alienation of the Kerteh land, this was not something over which they had any control. This is because of the provisions of the National Land Code 1965 ('the Code') which vests the power to alienate land in the sole discretion of the Exco. The decision of the Exco was a supervening event over which the respondents had no control. As such the said consent order, or so much of it as remained unperformed, was frustrated. The respondents were therefore discharged from further performance of the agreement embodied in the said consent order. So much for the respondents' case. G H I

A The appellant had, on 30 July 1997, taken out a motion in the first action to enforce the terms of said consent order. At that point in time, the appellant was unaware that the second action had been commenced. That is because the respondents' summons in the second action was only served on the appellant on 3 August 1997. However, on the application of the learned state legal adviser, the appellant's motion was adjourned pending B the hearing and disposal of the second action.

The learned judge who heard the second action agreed with the respondents' arguments and granted the relief sought by them. The learned judge declared that the first respondent was not bound by the consent order dated 17 November 1991 made in the first action. He also declared that the C consent order had become frustrated in consequence of the decision of the Exco. He thus absolved the second, third and fourth respondents from any liability for non-compliance with the terms of the consent order. The appellants have attacked these findings before us.

D *The issues*

Counsel for the appellant raised a number of issues during his argument. But in reality there are only three issues that are central to this appeal. First, whether the first respondent had been impleaded as a party to the first action and was therefore bound by its terms. Second, whether the consent order had become frustrated. Third, whether the respondents adopted the E correct procedure. We will address each of these issues in turn.

The first issue: was the first respondent bound by the consent order?

It is a principle, fundamental to our system of jurisprudence, that only a F party to proceedings may be bound by an order made therein (see *Kheng Chwee Lian v Wong Tak Thong* [1983] 2 MLJ 320). As presently advised we find only two exceptions to this rule. Both are of limited application. The first concerns injunctions which may be made binding upon the servants and agents of a party although such servants or agents are not themselves expressly made parties to the proceedings (see *Brydges v Brydges & Wood* G (1909) P 187.) The second exception is where a person who is interested in the proceedings is not a party but is 'in reality fighting the suit, so to say, from behind the hedge' (per Viscount Radcliffe in *Ibeneweka v Egbuna* [1964] 1 WLR 219.) Thus, in *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697, Edgar Joseph Jr SCJ observed (at p 724):

H

> As for the other contention based upon the breach of the rule of natural justice, to wit, that neither Haji Samat nor Haji Mahmud had been made parties to the proceedings in the court below seeking declaratory reliefs, and so had been denied the opportunity of being heard, it is true that the grant of such reliefs would, and as events turned out, did directly affect their position, and therefore they should have been made parties to those proceedings. That, I however, is not conclusive of the issue before us. Those proceedings had right from the start received considerable treatment in the local press, and both Haji Samat and Haji Mahmud must have known about them; yet they remained

passive and did nothing; they made no attempt to apply to be joined as defendants, which they certainly could have done. A denial of the opportunity of being heard is a wrong which is personal to the party aggrieved. If therefore such a party does not complain, it is not the affair of others to complain.

I find, therefore, that there is substance in the submission of counsel for the plaintiffs that the State Legislative Assembly of Kelantan is, in reality, as he put it, fighting the suit on behalf of Haji Samat and Haji Mahmud.

In this context, I consider the following passage in the judgment of Viscount Radcliffe, speaking for the Privy Council in *Ibeneweka v Egbuna* at p 266 to be apt:

> '... there had never been any unqualified rule of practice that forbade the making of a declaration even when some of the persons interested in the subject of the declaration were not before the court. Where, as here, the appellants had decided to make themselves the champions of the rights of those not represented — the Obosi people — and had fought the case on that basis, and where, as here, the trial judge took the view that the interested parties not represented were in reality fighting the suit, so to say, from behind the hedge, there was no principle of law which disentitled the judge from making a declaration of title in the respondents' favour.'

Having regard to the very exceptional circumstances to which I have directed attention, I consider that the learned judge was not prevented from making the declarations prayed for, in the exercise of his discretion, notwithstanding the fact that two of the persons interested in the subject matter of the declarations were not before the court.

The appellant has argued that the first respondent was indeed a party to the first action and was therefore bound by the terms of the consent order. In support of this submission, the appellant relies on the provisions of s 16(2) and (3) of the Code. Those provisions read as follows:

> (2) Any action, suit or other proceeding relating to land in which it is sought to establish any liability on the part of the state authority shall be brought against the State Director in the name of his office.
>
> (3) In any action, suit or other proceeding to which this section applies, the State Director may appear personally, or may be represented by any advocate and solicitor, any Federal Counsel, the State's Legal Adviser or any Land Administrator or other officer appointed under sub-s (1) of s 12.

It is manifestly clear from the plain language of the second subsection to s 16 of the Code that the state authority is to be impleaded in a suit or other proceeding by citing the State Director as a party. And, 'State Director' according to s 5 of the Code 'means the Director of Lands and Mines for the State appointed under s 12 and includes a Deputy Director of Lands and Mines appointed thereunder.'

It is not in dispute that the second respondent, the State Director, was a defendant in the first action. He was the first defendant. The state authority was, therefore, a party to the first action by virtue of s 16(2) of the Code. Further, the state legal adviser represented the defendants in the first

A action. There is no suggestion anywhere in the affidavits delivered by the instant respondents in the second action that the learned state legal adviser had no authority to agree to the terms set out in the consent order. It would be quite intolerable if in these circumstances the state authority were permitted to assert a lack of authority on the part of those nominated by the Code to represent it in litigation.

B Further, it is equally clear from well-established authority that a State Government is bound by the doctrine of res judicata. In this context it is sufficient to quote from the second edition of Professor Hogg's work *Liability of the Crown* at p 191:

> C The doctrine of res judicata is sometimes treated as a kind of estoppel, namely, estoppel by record. The doctrine stipulates that a judicial decision (unless reversed on appeal) is binding on the parties to the litigation, so that the same issue may not be re-litigated by the parties: once decided by a court of competent jurisdiction, the issue is said to be res judicata. The doctrine is obviously required in order to bring disputes to an end. Indeed, litigation would have little point if the losing party, without appealing, or after D exhausting appeals, were free to ignore the judgment and return to the courts again.
>
> The Crown is bound by res judicata. Any other conclusion would be fundamentally inconsistent with the Crown's subjection to legal proceedings in tort, contract and other heads of liability, which must surely imply that the Crown is bound by the outcomes.

E It follows from what has been said thus far that the first issue must be resolved in the appellant's favour.

The second issue: was there frustration?

F The consent order in the first action embodied the agreement that was entered into between the parties to the first action. It was therefore a contract that had been made into a rule of the court so that the ordinary principles governing the law of contract would apply in its enforcement. See *Tong Lee Hwa & Anor v Chin Ah Kwi and Tong Chong Fah v Chin Ah Kwi* [1971] 2 MLJ 75. A fortiori, the question whether any of the parties to the G agreement embodied in the consent order has been discharged from further performance.

The law of frustration is contained in s 57(2) of the Contracts Act 1950 which reads:

> H A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

The section postulates two supervening events that frustrate a contract. The first is an event that makes the contract impossible of performance: the second is the event of supervening illegality.

I In *Ocean Tramp Tankers Corp v V/O Sovfracht* [1964] 1 All ER 161 (CA), Lord Denning MR explained the operation of the doctrine. He said (at p 166):

> It has frequently been said that the doctrine of frustration only applies when the new situation is 'unforeseen' or 'unexpected' or 'uncontemplated', as if that were an essential feature. But it is not so. It is not so much that it is 'unexpected', but rather that the parties have made no provision for it in their contract. The point about it, however, is that: If the parties did not foresee anything of the kind happening, you can readily infer that they have made no provision for it. Whereas, if they did foresee it, you would expect them to make provision for it. But cases have occurred where the parties have foreseen the danger ahead, and yet made no provision for it in the contract. Such was the case in the Spanish Civil War when a ship was let on charter to the Republican Government. The purpose was to evacuate refugees. The parties foresaw that she might be seized by the Nationalists. But they made no provision for it in their contract. Yet, when she was seized, the contract was frustrated: see *WJ Tatem Ltd v Gamboa* [1938] 3 All ER 135. So, here, the parties foresaw that the canal might become impassable. It was the very thing that they feared. But they made no provision for it. So the doctrine may still apply, if it be a proper case for it.
>
> We are thus left with the simple test that a situation must arise which renders performance of the contract 'a thing radically different from that which was undertaken by the contract': see *Davis Contractors Ltd v Fareham UDC* [1956] 2 All ER 145 at p 160; [1956] AC 696 at p 729, per Lord Radcliffe. To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the old situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound. It is often difficult to draw the line. But it must be done, and it is for the courts to do it as a matter of law: see *Tsakiroglou & Co Ltd v Noblee & Thorl GmbH* [1961] 2 All ER 179 at pp 185, 187, [1962] AC 93 at pp 116, 119, per Viscount Simonds and per Lord Reid.

Now, it is well-settled that the doctrine of frustration has no room where there is fault on the part of the party pleading it. Another way of putting it is that self-induced frustration is no frustration. See *Dato Yap Peng & Ors v Public Bank Bhd & Ors* [1997] 3 MLJ 484. The Master of the Rolls dealt with the point in *Ocean Tramp Tankers Corp v V/O Sovfracht* as follows (at p 165):

> The second question is whether the charterparty was frustrated by what took place. The arbitrator has held that it was not. The judge has held that it was. Which is right? One thing that is obvious is that the charterers cannot rely on the fact that the Eugenia was trapped in the canal; for that was their own fault. They were in breach of the war clause in entering it. They cannot rely on a self-induced frustration; see *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524.

So too here. The refusal of the Exco to alienate the lands in question was a deliberate act of non-compliance of the consent order by a party to the first action. It was not a supervening event at all. In these circumstances, it is not

open to the instant respondents to rely on the doctrine. The doctrine of frustration has absolutely no application whatsoever to the fact pattern that forms the core of this appeal.

The other point raised by the respondents in the same context may also be conveniently disposed of at this stage. It has to do with s 29 of the Government Proceedings Act 1956. The respondents relied on proviso (b) to that section in support of their case. We will reproduce the whole provision. It reads as follows:

> (1) In any civil proceedings by or against the government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> Provided that —
>
> (a) where in any proceedings against the government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and
>
> (b) in any proceedings against the government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the government to the land or property or to the possession thereof.

The proviso is relevant to coercive proceedings to recover land from a government, be it Federal or that of a State, eg on the expiry of a tenancy. It is designed to prevent a writ of possession issuing against the government in execution of a judgment for possession. It follows that the short answer to the respondents' argument is that the second proviso has nothing whatsoever to do with the facts of this case. There is no bar to the Exco binding itself to alienate land to any person. This is precisely what happened here. Once the agreement was entered into and formalized as a rule of court, it vested in the appellant a legitimate expectation that the promise made to it will be carried out.

The law governing the doctrine of legitimate expectation in public law must now be taken to have been authoritatively settled by the judgment of the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1. There, Edgar Joseph Jr FCJ said (at p 59):

> For our part, we prefer the view of Simon Brown LJ in *Ex parte Baker* [1995] 1 All ER 73 and Sedley J in *Ex parte Hamble* [1995] 2 All ER 714 as we find the reasoning there more persuasive. It is also a view which appears to be supported by de Smith, as the following extracts from his book, *Judicial Review of Administrative Action* (5th Ed), indicate (at para 13–034):
>
> > 'Given the duty of a public body not to fetter its discretion under what circumstances will a legitimate expectation be protected in the face of a change in policy. Clearly, the change of policy must be 'a lawful exercise of discretion' (per Lord Scarman in *Re Findlay* [1985] AC 318 at p 338).

> The body's discretion to alter its policy must therefore be exercised after taking into account relevant considerations, and ignoring the irrelevant. The body must also pursue authorized and not extraneous purposes. These considerations and purposes can include matters such as the need to maintain national security and matters of public policy. Nor should the discretion be exercised unreasonably — for example, simply in order to confound the recipient of the expectation, or in bad faith. The conduct of the recipient of the representation should not be relevant to a decision to revoke the representation.'

It follows as a matter of pure logic from what we have said thus far, that the respondents' contention based on s 42 of the Code also falls by the wayside. That section vests the power in the Exco to alienate land. That is precisely what the Exco agreed to do in the first action. At the risk of repetition we would say that the Exco's later change of heart is not a supervening event that frustrated the consent order. It was a breach of an obligation voluntarily undertaken and given effect to in the form of an order of the court.

For these reasons, we would resolve the second issue also in the appellant's favour.

The third issue: was the correct procedure employed?

Counsel for the appellant has, both in his oral and written argument, submitted that the respondents had employed the wrong procedure. The argument here is that a declaration in the terms sought by the respondent would result in there being two inconsistent decisions in the same matter. The judgment of Abdoolcader J, (as he then was) in *Sungai Wangi Estate v Uni* [1975] 1 MLJ 136 was cited in support of this argument. With respect, we do not agree with this submission.

It must be remembered that the respondents' case in the court below was that the consent order had become void because it had been frustrated. It was also their case that the order had been made in breach of written law, namely s 42 of the Code and the second proviso to s 29 of the Government Proceedings Act 1956. Assuming they were correct in these arguments, the result would have been that the consent order was a nullity as having been entered in breach of written law. In such event, the respondents would have been entitled to a declaration to that effect. The point is sufficiently covered by the decision of the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393. That was a case where the appellant had taken out an originating summons for declaratory relief to rid himself of an order made in contravention of written law. Mohd Azmi FCJ who delivered the principal judgment of the court said (at p 409):

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written

law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

Accordingly, the reliance on *Sungai Wangi Estate v Uni* is misplaced. In any event, this court in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 overruled that case. It is our earnest hope that we will not hear of it again.

Further, we agree with the submission of the respondents that a consent order may be set aside in a fresh action on the same grounds on which an agreement may be set aside. If authority is required for this proposition, it is to be found in the decision of the Federal Court in *Khaw Poh Chhuan v Ng Gaik Peng* [1996] 1 MLJ 761. However, whether an action to impeach a consent judgment in a former action will succeed must depend upon the facts of the particular case. And, as we have already said, the respondents in the present instance have not made out a case to impeach the judgment in the first action.

Miscellaneous points

The appellant has raised several other arguments including an argument that the respondents had acted inequitably in pursuing the second action when the appellant had acted to its detriment in reliance of the consent order. Our attention was drawn to the several acts done by the appellant upon the faith of the consent order in the first action. We do not propose to discuss them here. Neither do we propose to discuss the authorities we were regaled with on the point. That is not to say that the points raised by the appellant lack merit. But by reason of the route we have taken, we find it unnecessary to deal with the other points raised by the appellant.

Conclusion

For the reasons already given, the appeal succeeds. The declarations granted by the learned judge in the second action are set aside. The respondents' summons in the second action is dismissed. For completeness, the appellant's motion in the first action is restored to file with a direction that it be fixed for hearing. The appellant will have the costs of the appeal and those incurred in the court below. The costs in this court include the costs of the appellant's motion to add new grounds of appeal. The deposit in court shall be refunded to the appellant.

Appeal allowed.

Reported by Jafisah Jaafar